

<sup>1</sup> Mr. Dreiling's report and task list was also offered without objection as an exhibit at Dr. Koprivica's deposition. And it was noted the parties had stipulated the report and task list were part of the evidentiary record.

ISSUES

The claimant was injured in a fall at work but respondent denied the claim was compensable because claimant had failed to use a safety harness system that was required when working three feet above the ground. Claimant was wearing the harness but had unhooked a lanyard that connected him to the lift he was on in order to count stock farther back on pallets. Claimant argued that it was common practice to unhook in order to count the second pallets stacked farther back.

The Special Administrative Law Judge determined that claimant's actions were not willful and the rule requiring use of the safety harness was not rigidly enforced by respondent. Consequently, the Special Administrative Law Judge concluded K.S.A. 44-501(d)(1) was not a bar to compensation of the claim and further found claimant sustained a 65 percent work disability based upon a 30 percent task loss and a 100 percent wage loss.

Respondent requests review of the following: 1) whether the director erred in appointing a Special Administrative Law Judge after terminal dates had passed and the matter had been submitted to the ALJ; 2) whether claimant should be denied compensation pursuant to K.S.A. 44-501(d)(1) for failure to use a safety guard; and 3) whether the Special Administrative Law Judge erred in awarding claimant a work disability. Respondent argues that appointing a Special Administrative Law Judge after the case had been submitted to the assigned Administrative Law Judge was improper given the nature of this claim which rests heavily on claimant's credibility. Consequently, respondent requests that the case be remanded for retrial or that the Board should conduct a de novo review of this case. Respondent further argues that claimant should be denied benefits for failure to use the safety equipment provided by the respondent.

Claimant requests the Board to affirm the Award. Claimant argues that respondent failed to sustain its burden of proof that claimant willfully failed to use a safety device by unhooking his safety harness while performing his work duties. Claimant further argues the evidence established that respondent did not rigidly enforce its safety rules. Finally, claimant argues the director has statutory authority to appoint a Special Administrative Law Judge and, in any event, the Board's review is de novo which is the relief requested by respondent.

The issues for Board review include whether the Workers Compensation Director erred in assigning this case to a special local Administrative Law Judge; whether compensation should be denied pursuant to K.S.A. 44-501(d)(1) because claimant failed to use a safety guard; and whether the claimant is entitled to compensation for a work disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This workers compensation claim proceeded to regular hearing on August 3, 2010, before Administrative Law Judge Marcia Yates Roberts. Terminal dates were established and then extended by agreement of the parties with claimant's terminal date being October 19, 2010, and respondent's terminal date being November 19, 2010. Evidence was presented and the matter submitted to the Administrative Law Judge, with claimant's submission letter being filed on October 26, 2010, and respondent's submission letter being filed on November 22, 2010.

On January 4, 2011, Acting Workers Compensation Director Seth Valerius entered an Order Appointing Special Administrative Law Judge. The Order indicated that an emergency existed and Jerry Shelor was appointed to issue the award in the instant case. The administrative file does not contain any indication that respondent filed an objection to the appointment of the Special Administrative Law Judge. The Special Administrative Law Judge issued the Award in this claim on February 3, 2011.

K.S.A. 2010 Supp. 44-523(c) states:

When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. The administrative law judge shall not stay a decision due to the absence of a submission letter. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record.

K.S.A. 2010 Supp. 44-551(k) states, in part:

In case of emergency the director may appointment special local administrative law judges and assign to them the examination and hearing of any designated case or cases. Such special local administrative law judges shall be attorneys and admitted to practice law in the state of Kansas and shall, as to all cases assigned to them, exercise the same powers as provided by this section for the regular administrative law judges.

Both K.S.A. 44-523(c) and K.S.A. 44-551(k) provide statutory authority for the Director to assign a case to a Special Administrative Law Judge either based upon a motion of the parties or based upon the Director's own motion. In this case the assignment was based on the Acting Director's own motion due to an emergency and the order was provided to all the parties. The notification to all the parties that the case was assigned to a Special Administrative Law Judge accorded the parties notice regarding the status of the case. And it allowed the parties the opportunity to timely object to the assignment in the event there was a conflict between a party and the assigned Special Administrative Law Judge. In this instance, a review of the Director's file and the Administrative Law Judge's file fails to uncover any contemporaneous objection to the assignment.

Respondent does not allege a specific due process violation nor allege that a conflict existed between respondent and the assigned Special Administrative Law Judge. But in this case, respondent argues that because credibility of the claimant is a significant issue in this claim the case should be remanded for retrial or the Board should conduct a de novo review; that the appointed Special Administrative Law Judge was not a local attorney; and, that the order did not specify the nature of the emergency.

Credibility of witnesses is generally a significant issue in all fact determinations in a workers compensation claim. Nonetheless, by statute the Board always conducts a de novo review of the facts, as well as the law. Stated another way, the relief requested by respondent, Board de novo review, is the statutory standard required of the Board in all cases. The statute conferring authority on the Director to appoint a Special Administrative Law Judge because of an emergency does not specifically mandate that the nature of the emergency be stated. Suffice it to say that an emergency could be due to reasons that cannot or should not be disclosed by the director, such as personnel or medical issues. Finally, respondent argues that the appointment is defective because the attorney is not a "local" attorney as required by K.S.A. 2010 Supp. 44-551(k). Mr. Shelor is an attorney admitted to the bar in Kansas with an office in Topeka, Kansas. Venue of this case is Johnson County. The Board concludes the statutory requirement of a "local" attorney has been met. And most significantly, respondent failed to lodge a contemporaneous objection to the appointment. The Board finds respondent's objections to the appointment of the Special Administrative Law Judge are without merit as the Acting Director had the statutory authority to appoint a Special Administrative Law Judge to decide the case and the appointment conferred jurisdiction on the Special Administrative Law Judge to issue the award in this case. But it should be noted that respondent's request that the Board conduct a de novo review will be followed, as it is in all of the cases the Board reviews.

**Whether compensation should be disallowed pursuant to K.S.A. 44-501(d)(1).**

Claimant was employed as an inventory control manager for respondent. On October 17, 2009, claimant was at work performing an inventory count on racks that have pallets stacked two deep and are approximately 14 feet high. The claimant was using a forklift to raise himself up in order to count the pallets. He was wearing a required safety

harness that was attached to the lift by a five foot lanyard. As claimant was performing the inventory he unhooked the lanyard so he could count a second rack of pallets stacked in back. Claimant unhooked the lanyard because it was not long enough to allow him to get far enough back to count the second rack of pallets. After counting the second rack of pallets claimant was attempting to reattach the lanyard to his harness and get back on the lift when he slipped and fell approximately six feet onto the concrete floor in the warehouse.

Claimant admitted that he knew respondent had a policy against unhooking the safety harness. But claimant further testified that it was routine practice to unhook the safety harness to count the items on the second pallet and he had done so for 15 years. And claimant testified that his supervisor had observed him unhook from the lanyard and claimant had never been disciplined for that activity. Claimant testified:

Q. And when you're counting the second pallet back using this particular lift you have to unhook?

A. Right.

Q. You have to unhook to get back to the second pallet?

A. Right, yeah.

Q. Did your supervisors know that that was the way the work was being done, to your knowledge?

A. Yes.

Q. Did anybody tell you not to do that?

A. Yeah, they mentioned it but like I said, pretty much everybody did it. Some stuff you just can't get to, you know.

Q. How many years had you been doing this job in that fashion where you would climb up and have to unhook to get to the back pallet?

A. Probably about 15 years or something.

Q. And to your knowledge, is that commonly done in the warehouse?

A. Yes.<sup>2</sup>

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<sup>2</sup> R.H. Trans. at 10.

Claimant also testified that he had observed the operations manager unhook his lanyard just a few days before claimant was injured in the fall. And claimant further testified that Mr. Blankenship was not his supervisor.

Vyron Woody, a former employee for respondent who had been terminated for drinking on the job, testified that while he worked for respondent it was common practice to unhook the lanyard to count the second pallets. He further testified that he worked for respondent for only a couple of months after Max Blankenship became the operations manager and during that time there was no strict enforcement of safety rules.

Max Blankenship, respondent's operations manager, testified that when he began working for respondent the safety rules were not being enforced. But after a grace period he began to enforce such rules. Mr. Blankenship testified that all employees were required to have their safety harnesses attached to a lanyard when working more than three feet off the ground and that the requirement was discussed at the monthly safety meetings that all employees were required to attend. If a supervisor observed an employee violating the rule, the employee would receive a written warning and after receipt of three warnings, which could include warnings for violation of any company rule, the employee would be discharged. Mr. Blankenship testified that eight to ten employees had received written warnings for violation of the safety harness rule. Mr. Blankenship further testified that one employee had three warnings for violation of the safety harness rule and that employee had been terminated. But Mr. Blankenship admitted that termination occurred after claimant was injured as nobody had been terminated for failure to hook up the safety lanyard before claimant's accidental injury. And Mr. Blankenship agreed that claimant had never been written up for any safety violation. Finally, Mr. Blankenship testified that he always attached the safety lanyard to the harness as required by the safety rules.

It is undisputed that claimant had unhooked the lanyard that attached his harness to the lift he was working on so that he could crawl over the bales to count the pallets stacked in back. When he attempted to reattach the lanyard and climb back onto the lift he slipped and fell. This was exactly the type of incident that the lanyard attached to the harness was designed to provide protection against.

K.S.A. 2010 Supp. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in

*Bersch*<sup>3</sup> and the Court of Appeals in a much more recent decision in *Carter*<sup>4</sup> have defined “willful” to necessarily include:

. . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . ‘Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.’ *Carter* at 85.

And the mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.<sup>5</sup>

In this instance claimant was wearing the harness but had detached the lanyard when the accident occurred. And claimant knew he was required to wear the harness with the lanyard attached. But claimant testified that he had frequently unhooked his lanyard while performing inventory counts and had seen other employees do the same thing, including the operations manager. Moreover, claimant’s testimony that his supervisor had observed him unhook from the lanyard and had not disciplined him was uncontradicted as his supervisor did not testify. Claimant’s actions may well have been careless and negligent but the evidence does not rise to the level that his actions were a deliberate willful intention to cause the injury.

Moreover, the foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

**Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The administrative regulation promulgated to implement the requirements K.S.A. 2010 Supp. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee’s right to compensation. There was simply no testimony to refute claimant’s contention that his supervisor had witnessed him working with the lanyard disconnected which would indicate that the safety rules were disregarded and not rigidly enforced. Again, the supervisor did not testify. The Board is mindful that Mr. Blankenship testified that the rule was rigidly enforced and employees violating the rule had been disciplined and one employee had been terminated. But Mr. Blankenship admitted that the one employee’s termination for violation of the safety rule did not happen until after claimant’s accidental injury.

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<sup>3</sup> *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

<sup>4</sup> *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

<sup>5</sup> *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

Based upon a review of the entire evidentiary record, the Board finds respondent has not met its burden of proof to establish that claimant's actions in unhooking the lanyard were willful, consequently K.S.A. 2010 Supp. 44-501(d) does not bar the allowance of compensation for this claim.

### **Nature and Extent of Disability**

As a result of the fall onto the concrete floor the claimant injured his left hip, low back and left wrist. After the accident the claimant went home but the following morning he was unable to get out of bed and walk. An ambulance transported him to the emergency room at Olathe Medical Center. An x-ray of the left wrist revealed a distal radius fracture with some displacement. After x-rays of the left hip there was a question whether there was a non-displaced fracture of the posterior column of the left acetabulum. Consequently, there was a CT scan of the left hip performed which was negative for a fracture.

Claimant was sent to Concentra Medical Center on October 20, 2009, for follow-up. Drug screening was also obtained and apparently was positive for marijuana. Claimant's employment was terminated by respondent on October 20, 2009. Claimant then obtained treatment on his own with Dr. David Steinbronn who on November 10, 2009, performed a closed reduction and percutaneous pinning of the claimant's left distal radius fracture. The pins were apparently removed in December 2009.

At the request of claimant's attorney, Dr. P. Brent Koprivica, performed an examination and evaluation of claimant on January 22, 2010. Dr. Koprivica reviewed claimant's medical records and performed a physical examination of claimant. The physical examination revealed significant loss of grip strength on the left with loss of motion. Claimant also had left lower back pain that included the sacroiliac joint with a demonstrated loss of range of motion. Dr. Koprivica diagnosed claimant with post-displaced fracture of the left wrist with loss of grip strength and motion. He further diagnosed claimant with chronic left-sided lower back pain associated with chronic lumbosacral strain/sprain and left sacroiliac chronic sprain. Dr. Koprivica opined claimant suffered a 20 percent functional impairment to the left upper extremity which would convert to a 12 percent whole person impairment. And Dr. Koprivica further opined claimant suffered a 5 percent DRE Category II impairment for the injury to the lumbar and pelvic region. The doctor testified that the whole person impairment ratings combined for a 16 percent whole person impairment.

Dr. Koprivica imposed permanent restrictions on claimant limiting lifting and carrying to occasional tasks. And claimant should be limited to a 50 pound maximum for the occasional lifting and carrying. Dr. Koprivica further imposed restrictions that claimant should avoid frequent or constant bending at the waist, pushing, pulling, or twisting. Avoid sustained or awkward postures of the low back and avoid frequent or constant squatting, crawling, kneeling or climbing. The doctor further testified that due to the injury to the left



upper extremity, claimant should avoid repetitive grasping, pinching, repetitive flexion or extension of the wrist, repetitive ulnar deviation of the wrist, so claimant is not to use his left upper extremity to perform highly repetitive tasks. Dr. Koprivica applied his restrictions to a task list of claimant's pre-injury 15-year work history compiled by Michael Dreiling and concluded claimant could no longer perform 6 of the 10 tasks for a 60 percent task loss.

At the request of respondent, Dr. James Zarr, performed an examination and evaluation of claimant on July 28, 2010. Dr. Zarr reviewed claimant's medical records and performed a physical examination of claimant. Dr. Zarr diagnosed claimant with distal left radius fracture status post percutaneous pinning and persistent low back pain. Dr. Zarr opined claimant suffered a DRE Category II 5 percent whole person functional impairment as a result of his low back injury and a 2 percent functional impairment for the left wrist. Dr. Zarr did not impose any permanent restrictions.

Both Drs. Zarr and Koprivica provided a 5 percent functional impairment rating for claimant's low back injury. The injury to claimant's low back is not an injury addressed in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial general disability benefits are governed by K.S.A. 44-510e, which requires claimant's wage loss to be averaged with his task loss.

In *Bergstrom*,<sup>6</sup> the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.<sup>7</sup>

K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.<sup>8</sup>

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<sup>6</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>7</sup> *Id.*, Syl. ¶ 1.

<sup>8</sup> *Id.*, Syl. ¶ 3.

We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee “*is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.*” (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.<sup>9</sup>

In the absence of *Bergstrom*, the reasons for claimant’s termination and his efforts to retain his employment would have been an issue for the Board to consider in determining whether claimant’s actual post-injury wages or his wage-earning ability should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid. Consequently, claimant’s actual post-injury earnings must be used in computing his permanent partial general disability. And the difference in claimant’s pre- and post-injury wages is 100 percent. And that is claimant’s wage loss for the permanent partial general disability formula.

Dr. Koprivica provided a 60 percent task loss opinion utilizing the task list prepared by Mr. Dreiling. Conversely, Dr. Zarr did not impose any permanent restrictions which would result in a 0 percent task loss. The Special Administrative Law Judge averaged the task loss opinions for a 30 percent task loss. The Board finds that neither doctor’s opinion is more persuasive and, therefore, each should be given equal weight. The Board adopts and affirms the Special Administrative Law Judge’s finding that claimant’s loss of task performing ability is 30 percent. And averaging a 30 percent task loss with a 100 percent wage loss results in a 65 percent work disability. Consequently, the Board affirms the SALJ’s Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>10</sup> Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

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<sup>9</sup> *Id.* at 609-610.

<sup>10</sup> K.S.A. 2009 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated February 3, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary M. Peterson, Attorney for Claimant  
Katharine M. Collins, Attorney for Respondent and its Insurance Carrier  
Marcia Yates Roberts, Administrative Law Judge  
Jerry Shelor, Special Administrative Law Judge